

In re) Fair Hearing No. L-10/09-580
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 Appeal of)

The petitioner appeals the decision by the Department for Children and Families, Family Services Division substantiating a report of child sexual abuse by her son, who was fourteen years old when the incident that is the subject of these proceedings took place. The issues are whether a preponderance of evidence establishes that the alleged incident took place and, if so, whether the incident meets the pertinent statutory definition of sexual abuse.

FINDINGS OF FACT

2. The incident led to delinquency charges being

brought against A.P. in Family Court. On August 27, 2009 A.P. stipulated, and the Court ruled, that he had committed the acts of "reckless endangerment, furnishing alcohol to a minor". A.P. stipulated, and the Court found:

Failure to report S.P.'s compromised mental; and physical state to adults in a timely fashion, despite her being out in the cold, putting her at risk of hypothermia/illness, and furnishing her with alcohol when she was under 21.

3. A condition of A.P.'s probation was that he: "Participate in mental health counseling with a focus on sexual boundaries and alcohol use."

4. A.P. did not appear at the fair hearing. He was represented by an attorney, and his mother. No testimony was presented in A.P.'s behalf. The Department introduced testimony from two police officers who were involved in the investigation of the incident and from S.P. There is essentially no dispute regarding the following.

On February 20, 2009 A.P. brought a bottle of liquor to a "teen night" at the Boys and Girls Club. A.P. and S.P. drank some of this liquor in the club, and then went outside to a secluded area in a parking lot, where S.P. continued to drink. S.P. and A.P. "kissed a little" before S.P. bumped her head and fell on the ground. A.P. later became concerned that S.P. could not get up, and he first tried to enlist the help of some friends who were in the club, then he called his mother, who drove him and S.P. home. Later that night S.P. went to the hospital and alleged that A.P. had sexually

assaulted her. A.P. left S.P. lying in the parking lot on a cold night unable to help herself for an inappropriate length of time (sufficient to constitute "reckless endangerment", see *supra*) before he summoned help.

The remaining findings of fact are based on evidence that is to some degree in dispute.

5. S.P. testified at the hearing that after some kissing, A.P. "tried to go further", but she said no. While she was on the ground unable to effectively physically resist, A.P. put his hand in her pants. A.P. was bigger than she was, and although she verbally protested, she "couldn't get out of the situation on her own".

6. The police officer who later responded to the call from the hospital described S.P.'s behavior that night at the hospital as hysterical, screaming that she had been "raped". At no subsequent time, however, has there been any allegation or evidence that the sexual contact that took place was more than described by S.P. at the hearing, see *supra*.

7. Another police officer testified at the hearing that in an interview he had conducted on March 26, 2009 A.P. admitted supplying alcohol to S.P. and some other male friends that night. A.P. also admitted that he had loosened S.P.'s pants and put his finger "in her vagina" while she was on the ground and unresponsive. A.P. insisted that the sexual contact with S.P. was unforced and consensual.

8. At the hearing, A.P.'s attorney argued that A.P.

didn't know the meaning of "vagina" when he spoke with the police officer, and that there was no physical evidence of "penetration".

9. The hearing officer deemed S.P. to be a credible witness. Although her memory of that night may be less than vivid, she has been consistent throughout that her sexual activity with A.P. that night, beyond "some kissing", was not consensual, and that she communicated this to A.P. There is no credible evidence that A.P. would not understand the meaning of "fingering" a girl's "vagina".

10. Credible evidence establishes that A.P. furnished alcohol to S.P. that night with the intent to take sexual advantage of her, and that he did so when she became unable to resist. Although he later became concerned and ceased this activity, he admittedly placed S.P. in considerable physical danger by not summoning help for her in a more timely manner.

ORDER

The Department's decision substantiating the report in question as sexual abuse is affirmed.

REASONS

The Department is required to investigate reports of child abuse, neglect, or sexual abuse and to maintain a registry with the names and records of those who are determined to have a "substantiated" finding of abuse or

neglect against them. 33 V.S.A. § 4913 and 4916. A report is substantiated when it is "based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912(10).

Any person against whom a report of abuse is substantiated by DCF may appeal to the Human Services Board. In such cases the burden of proof is on the Department. 33 V.S.A. § 4916b.

The statutory sections relied upon by DCF in this matter include the following:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

. . .

(8) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

33 V.S.A. § 4912

In cases where both the alleged victim and perpetrators are minors, the Department applies the following policy under Section 2010.05 of its rules to determine substantiation of sexual abuse:

1. The victim is being exploited, or prostitution is involved;
2. Force, coercion or threat is used to sexually victimize the child, or the victim did not have the ability or opportunity to consent; or,
3. A significant difference in age, size or developmental level is used to sexually victimize the child.

Although there may be some sympathy in the petitioner's argument that it is harsh to label her fourteen-year-old son as a perpetrator of sexual abuse, it must be concluded that the Department's decision in this matter is supported both by a preponderance of credible evidence and a reasonable interpretation of the applicable statute and its own policies. Therefore, the Board is bound to affirm. 3
V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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